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No. 85-1710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MALLINCKRODT, INC.,
Petitioner,

vs.

SAMUEL F. BENNETT, *et al.*,
Respondents.

On Petition For Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE PETITION

This case is still in the pleading stage, and hence there has been no final judgment for purposes of review by this Court.

In addition, this Court has previously addressed the issue presented by Petitioner, and has held that state tort law is a valid remedy for compensating victims of nuclear exposure, and is neither preempted by, nor in conflict with, federal law.

A. A Legal Dispute Which Is Still In The Pleading Stages And Which Thus Presents No Clearly Defined Record For Review Is Not Ripe For Purposes Of Adjudication By This Court.

Mallinckrodt's Petition for a Writ of Certiorari in this case should be denied because as of yet there is still no clearly defined record upon which this Court could base a ruling.

It is a firmly established principle of this Court that this Court's jurisdiction to review a state court's decision is generally limited to a final judgment rendered by the highest court of the state in which a decision may be had. 28 U.S.C. §1257, *Cox Broadcasting v. Cohn,* 420 U.S. 469.

There has been no final judgment in this case, rather the relationship between the parties is still in the pleading stage. Although the plaintiffs brought their action in 1983, Mallinckrodt has yet to file either an answer to the plaintiffs' complaint or a motion for summary judgment based upon facts established by affidavit or discovery. Instead, Mallinckrodt has attempted by a variety of means to forestall an adjudication of the merits of this case.

Mallinckrodt has based its Petition for a Writ of Certiorari on no more than bald assertions set forth in its motion to dismiss plaintiffs' complaint and in this Petition Mallinckrodt is, in effect, seeking an opinion from this Court before either pleading or proving compliance with the federal statutes under which it seeks protection.

B. State Tort Law Which Compensates Victims Of Nuclear Exposure Is A Valid Remedy That Is Neither In Conflict With, Nor Preempted By Federal Law.

Mallinckrodt's Petition should be denied because the legal issue raised in this case has already been settled by this Court in *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238.

The issue underpinning this case is whether a state tort remedy authorizing an award of damages against a federally licensed nuclear facility for conduct related to nuclear hazards is available to those injured by nuclear exposure.

This Court, in *Silkwood,* 464 U.S. at 625-626, held that such a remedy is indeed available to victims of nuclear exposure, and that such remedy is neither in conflict with, nor preempted by federal law. In addition, the *Silkwood* decision, as applied to Missouri tort law, has already been afforded a well-reasoned and exhaustive analysis in *Samuel F. Bennett v. Mallinckrodt, Inc.,* 698 S.W.2d 854 (Mo. App. 1985).

Thus, in pursuing its argument of federal preemption in this case, Mallinckrodt is merely rehashing issues resolved by this Court in *Silkwood.*

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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